NO. 34743

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

FARMERS MUTUAL
INSURANCE COMPANY,

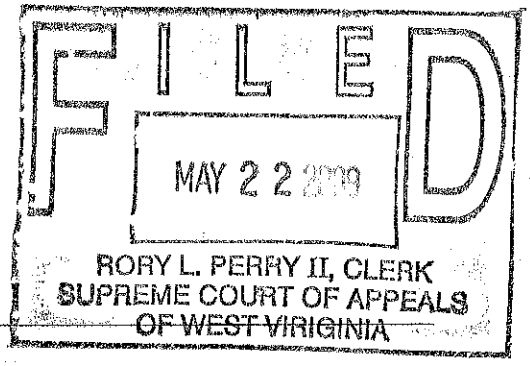
Appellant,

v.

Civil Action No. 02-C-373

KEVIN FIKE, individually and in his capacity as agent of Farmers Mutual Insurance Company,

Appellee.



BRIEF ON BEHALF OF THE APPELLANT, FARMERS MUTUAL INSURANCE COMPANY, IN SUPPORT OF ITS PETITION FOR APPEAL

James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Natalie A. Givan (WV State Bar #9567)

Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035

McNeer, Highland, McMunn and Varner, L.C.
Of Counsel

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STATEMENT OF THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

On or about May 29, 2002, the Plaintiff below, Doris E. Jennings, (hereinafter "Jennings") filed her Complaint against Farmers Mutual Insurance Company (hereinafter "Farmers"), Appellant herein, and Kevin Fike (hereinafter "Fike"), Appellee. In her Complaint against Farmers, Jennings asserted claims for Hayseeds damages, breach of contract, bad faith-UTPA violations, and bad faith-common law violations, allegedly stemming from a fire on the premises of her family business on August 15, 2001. Against both Farmers and Co-Defendant Fike, Jennings also asserted claims for intentional and negligent infliction of emotional distress. Finally, against Defendant Fike, only, Jennings asserted a claim for professional negligence.

Subsequently, on or about December 5, 2002, following the withdrawal of its Motion to Dismiss for lack of venue, Farmers filed its Answer to Jennings' Complaint and also its Cross-Claim against Fike for negligent misrepresentation, indemnification, and/or contribution. Fike filed his Answer to Farmers' Cross-Claim on or about July 14, 2003.

Thereafter, on or about April 26, 2004, near the close of discovery, Fike filed his "Motion for Summary Judgment on Cross-Claim of Farmers Mutual Insurance Company." In response, on or about May 18, 2004, Farmers filed "Farmers Mutual Insurance Company's Response in Opposition to Kevin Fike's Motion for Summary Judgment on Crossclaim and Incorporated Memorandum of Law."

Importantly, on or about June 16, 2004, Jennings and Farmers settled all matters in controversy between them. Said settlement occurred as a result of a mediation wherein all parties were invited to participate. Likewise, in conjunction with the proceedings then pending and related

thereto, on or about October 28, 2004, Farmers filed its "Third-Party Complaint" against Utica Mutual Insurance Company (hereinafter "UTICA") for violations of the West Virginia Unfair Trade Practices Act (UTPA) arising out of UTICA's handling of the claim presented by Farmers for the negligence claims asserted against Fike by both Farmers and Jennings.

On or about November 22, 2004, Fike filed his "Reply of Defendant Kevin Fike in Support of Motion for Summary Judgment on Cross-Claim." In addition, also on November 22, 2004, Fike filed a second motion for summary judgment, a "Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual."

Following the filing of UTICA's "Motion to Dismiss Farmers' Third Party Complaint and Answer" on or about December 27, 2004, by way of Agreed Order of February 16, 2005, Farmers and UTICA agreed to bifurcate and stay all bad faith claims asserted by Farmers against UTICA pending resolution of the underlying tort action.

In response to Fike's Motion for Summary Judgment on the Claims Assigned by Jennings, discussed above, on or about January 26, 2005, Farmers filed "Farmers Mutual Insurance Company's Response in Opposition to Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual and Incorporated Memorandum of Law." In reply, on or about March 15, 2005, Fike filed his "Reply Memorandum in Support of Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual."

Finally, on March 21, 2005, the circuit court below held arguments on both of the aforementioned motions for summary judgment filed by Fike. By Order entered May 20, 2008, the circuit court granted both motions for summary judgment filed by Fike. Specifically, the circuit court held the following: 1) That Farmers' cross claim against Fike for contribution was extinguished by its good faith settlement with Jennings; 2) That Farmers did not rely on any information provided

by Fike in deciding to insure the Repo Depo; and 3) Jennings claims were for unliquidated, personal causes of action and were thus not assignable to Farmers.

STATEMENT OF FACTS

In May 2001, Fike took an application for a Businessowners Policy for the Repo Depo fuel-station and convenience store, a family business owned by Jennings. In May 2001, Fike was employed by the Hartley Insurance Agency (hereinafter "Hartley"). Hartley wrote insurance for various insurance companies, including Farmers.

Prior to her dealings with Farmers, in May 2001, Jennings contacted agent Skip White (hereinafter "White"), with Allstate Insurance Company, to obtain insurance for Repo Depo. Because Allstate did not write liquor liability insurance and as White and Fike were friends, White advised Jennings that he might be able to help facilitate contact between Jennings and Fike. *See Deposition Transcript of Doris Jennings, dated January 6, 2004, at page 21.* Thus, White traveled with Fike to Repo Depo to attend the first meeting between Fike and Jennings. *See Deposition Transcript of Doris Jennings at page 22.*

As testified by all three (3) attendees of the initial meeting at their depositions (Fike, Jennings, and Kevin Miller[1] (hereinafter "Miller")), at the initial meeting, Fike did not have an insurance application with him. Rather, Fike simply took notes on his legal pad after asking questions from memory. *See Deposition of Doris Jennings at page 32; See Deposition Transcript of Kevin Fike, dated February 18, 2004, at page 43; and See Deposition Transcript of Kevin Miller, dated September 26, 2001, at page 7.*

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[1] For the benefit of the record, Farmers would note that while not a Plaintiff in th is action or an insured under Farmers' policy with Jennings, Miller is Jennings' husband.

On or about June 11, 2001, a Businessowners Policy was issued to Jennings for the Repo Depo property. Just two (2) months later, on August 15, 2001, Repo Depo was destroyed by fire. As a result, Farmers undertook an investigation of Jennings' claim and provided coverage to Jennings and Repo Depo. Consequently, on November 9, 2001, Farmers paid to Jennings the coverages available under her Repo Depo policy, totaling approximately two hundred forty-five thousand dollars ($245,000.00). Importantly, Fike did not provide Farmers with the completed ACORD insurance supplement forms until after Jennings' fire loss at Repo Depo on August 15, 2001. Moreover, when provided, as discussed in great detail below, said forms were replete with misrepresentations, including those related to Jennings' loss history. Notably, according to the testimony of Farmers' underwriter Lyndon Auvil, (hereinafter "Auvil") had he known about Jennings' loss history, he would not have underwritten the Repo Depo policy or proceeded with the account. *See Deposition Transcript of Lyndon Auvil, dated February 18, 2004, at page 70.*

When the misrepresentations on the ACORD supplement forms were discovered by Farmers, Fike accused Jennings of fraud with respect to the information contained in said forms. Such accusations inevitably caused the proliferation of erroneous conclusions regarding Jennings' honesty and integrity which affected Jennings' policy recovery.

Notwithstanding, as detailed above, on or about May 29, 2002, Jennings instituted suit against Farmers and Fike for their handling of the Repo Depo fire loss claim. Jennings' causes of action against Farmers and Fike arose not only from Fike's actions during the application process, but also during the recovery process due to Fike's failure to negate Farmers' erroneous conclusions regarding Jennings' honesty and integrity. Simply stated, Fike accused Jennings of fraud to re-direct attention from his mistakes made during the application process.

Subsequently, on or about June 16, 2004, Jennings (and Miller) and Farmers entered into a settlement agreement wherein Jennings released all claims against Farmers for damages and losses arising out of the August 15, 2001 fire at Repo Depo for the sum of five hundred thousand dollars ($500,000.00). Furthermore, as part of said settlement agreement, Jennings further assigned to Farmers any and all causes of action she had against Fike in the circuit court action arising from her May 29, 2002 Complaint.

ASSIGNMENTS OF ERROR

I. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement With Jennings.

II. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers Did Not Rely Upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Cross-Claim for Negligent Misrepresentation.

III. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Jennings' Claims against Fike Were Not Assignable to Farmers.

STANDARD OF REVIEW

As summarized in Clarence T. Coleman Estate v. R.M. Logging, Inc., 2008 W. Va. LEXIS 52 (*per curiam*):

> This Court's standards of review concerning summary judgments are well settled. As syllabus point 3 of *Aetna Casualty and Surety Company v. Federal Insurance Company of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963), holds: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 2, *Jackson v. Putnam County Board of Education*, 221 W. Va. 170, 653 S.E.2d 632 (2007); syl. pt. 1, *Mueller v. American Electric Power Energy Services*, 214 W. Va. 390, 589 S.E.2d 532 (2003). In that regard, this Court has observed that, in reviewing an order granting a motion for summary judgment, any permissible inferences from the underlying facts must be drawn in the light most favorable to the party opposing the motion.

Mueller, supra, 214 W. Va. at 393, 589 S.E.2d at 535; *Zirkle v. Winkler*, 214 W. Va. 19, 21, 585 S.E.2d 19, 21 (2003).

More specifically, as syllabus point 3 of *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), holds:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56 (f) of the West Virginia Rules of Civil Procedure.

Syl. pt. 1, *Short v. Appalachian OH-9, Inc*, 203 W. Va. 246, 507 S.E.2d 124 (1998); syl. pt. 4, *Evans v. Mutual Mining*, 199 W. Va. 526, 485 S.E.2d 695 (1997).

Upon appeal, the entry of a summary judgment is reviewed by this Court *de novo*. *Angelucci v. Fairmont General Hospital*, 217 W. Va. 364, 368, 618 S.E.2d 373, 377 (2005); syl. pt. 1, *Koffler v. City of Huntington*, 196 W. Va. 202, 469 S.E.2d 645 (1996); syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Nevertheless, as this Court stated in syllabus point 3 of *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997): "Although our standard of review for summary judgment remains *de novo,* a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl., *Hively v. Merrifield*, 212 W. Va. 804, 575 S.E.2d 414 (2002); syl. pt. 3, *Glover v. St. Mary's Hospital*, 209 W. Va. 695, 551 S.E.2d 31 (2001).

POINTS AND AUTHORITIES

I. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement With Jennings.

II. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers Did Not Rely upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Cross-Claim for Negligent Misrepresentation.

III. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Jennings' Claims against Fike Were Not Assignable to Farmers.

DISCUSSION

I. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers' Cross-Claim Against Fike for Contribution was Extinguished by Farmers' Good Faith Settlement With Jennings.

In its Order of May 20, 2008, the Circuit Court of Monongalia County, West Virginia, concluded that Farmers' claim for contribution failed when Farmers settled with Jennings. In support of its conclusion, the circuit court reasoned that when Farmers settled with Jennings, Farmers settled only Jennings' claims against Farmers and that Farmers was under no obligation to pay Jennings for any damages incurred as a result of Fike's conduct. Citing Board of Educ. v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 390 S.E.2d 796 (1990), the circuit court also held that Farmers' right to contribution from non-settling parties was extinguished. Additionally, relying upon Reager v. Anderson, 179 W. Va. 691, 371 S.E.2d 619 (1988), the circuit court further reasoned that a joint judgment could not be returned, due to Farmers' settlement with Jennings, precluding the allocation of fault between Farmers and Fike.

Despite the circuit court's conclusion that Farmers was under no obligation to pay Jennings for any damages incurred as a result of Fike's conduct, West Virginia Code § 33-12-22 provides, and the circuit court below acknowledged, that "[a]ny person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer not the agent of the insured." As discussed in Harless v. First Nat'l Bank, 169 W. Va. 673, 684, 289 S.E.2d 692, 699 (1982), "[a]n agent or employee can be held personally liable for his own torts against third parties and this personal liability is independent of his agency or employee relationship. Of course, if he is acting within the scope of this employment, then his principal or employer may also be held liable." Id. at 684, 699. "The relation of master and servant in those cases, in which the doctrine of

respondeat superior applies, is joint, and the parties should be regarded as though they were joint tortfeasors. In some respects, however, the relationship may be regarded as joint and several." Id. *citing* State ex rel. Bumgarner v. Sims, 139 W. Va. 92, 111, 79 S.E.2d 277, 289 (1953). In fact, a plaintiff is permitted to sue the principal either alone or together with the agent. Woodrum v. Johnson, 210 W. Va. 762, 768, 559 S.E.2d 908, 914 (2001).

Farmers and Fike are alleged joint tortfeasors due to their master-servant relationship. Farmers, therefore, can be held liable for the torts committed by Fike if committed while acting within the scope of his employment. Thus, despite the circuit court's finding that "Farmers was under no obligation to pay Jennings for any damages she incurred with regard to Fike's conduct," Farmers was held liable for the torts committed by Fike while acting within the scope of his employment, resulting in the payment of approximately two hundred and forty-five thousand dollars ($245,000.00) to Jennings under the terms of the insurance policy.

Misapplying Zando, *supra*, the circuit court concluded that Farmers' right to contribution from non-settling parties was extinguished when Farmers settled with Jennings. However, Zando holds the exact opposite. In fact, as set forth in Zando, "a party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution." Id. at 606, 805. Thus, applied to the facts at issue in this case, Zando would relieve Farmers of any liability for contribution, not Fike, and Fike's right to contribution, not Farmers', would have been extinguished by Farmers' settlement with Jennings. As discussed by the Zando Court,

> "[s]uch a rule furthers the strong public policy favoring out-of-court resolution of disputes. . ." Id. at 604, 803. Indeed, "[f]ew things would be better calculated to frustrate this policy, and to discourage settlement of disputed t ort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors and perhaps joint liability." Id. at 605,

> 804, *citing* Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976). Thus, "[f]rom a practical standpoint, the reduction of the verdict to reflect partial settlements counterbalances the loss of the right to contribution, since the remaining defendants, who would otherwise have been entitled to such right, obtain the benefit of the settlement." Zando, *supra*, at 605, 804 *citing* Dunn v. Sears, Roebuck & Co., 645 F.2d 511 (5th Cir. 1981); Poupore v. Seguin, 82 Misc. 2d 1, 367 N.Y.S.2d 950 (1975). "Verdict reduction also allocates liability to some extent among those jointly responsible for the plaintiff's injury." Zando at 605, 804. "The settling defendant is, in effect, paying a share of liability on the verdict." Id. at 605, 804. "At the same time, the use of the verdict credit ensures against double recovery by the plaintiff." Zando at 605, 804 *citing* Luth v. Rogers & Babler Constr. Co., 507 P.2d 761 (Alaska 1973), et al.

Any decision by this Court but to permit Farmers' contribution claim would deter, rather than encourage, settlements in cases where there are multiple defendants. In such cases with multiple defendants, if said defendants were forced to give up their rights to contribution upon settlement, said defendants simply would not settle, thus negating the public policy in favor of settlement. As the circuit court's ruling stands, recalcitrant defendants who pay nothing towards settlement are rewarded while those who acknowledge their responsibilities are punished. Specifically, in the pending case and in accordance with the circuit court's ruling, Fike receives the benefit of Farmers' settlement with Jennings and provides nothing in exchange, therefor.

Relying upon Reager, *supra*, the circuit court further reasoned that a joint judgment could not be returned, due to Farmers' settlement with Jennings, precluding the allocation of fault between Farmers and Fike. Importantly, however, as early as 1977, in Haynes v. City of Nitro, 161 W. Va. 230, 240 S.E.2d 544 (1977), this Court recognized the right of inchoate contribution. As discussed by the Court in Howell v. Luckey, 205 W. Va. 445, 448, 518 S.E.2d 873, 876 (1999), prior to Haynes, it was believed that contribution was only available after a joint judgment against joint tortfeasors.

Indeed, long-standing West Virginia precedent has recognized that "[a] release to, or an accord and satisfaction with, one or more joint trespassers, or tortfeasors, shall not inure to the benefit of another such trespasser, or tortfeasor, and shall be no bar to an action or suit against such other joint trespasser, or tortfeasor, for the same cause of action to which the release or accord and satisfaction relates." W. Va. Code § 55-7-12. In fact, "a judgment against one joint tortfeasor is not a bar to a suit against another joint tortfeasor for the same tort, and nothing short of full satisfaction, or that which the law must consider as such, can make the judgment a bar to a subsequent action, is, in our opinion, just and reasonable, and is supported by the great weight of authority in the United States." Bumgarner, *supra*, at 116, 292.

Importantly, as discussed in Cline v. White, 183 W. Va. 43, 46, 393 S.E.2d 923, 926 (1990):

> Settlements which occur between *parties* prior to trial are usually approached in one of two ways: (1) the jury is informed of the settlement, prior to its deliberation, and instructed that if a plaintiff's verdict is found, the settlement amount should be deducted from the verdict; or (2) the jury is not instructed that a settlement has been reached, but rather the trial court simply deducts the settlement amount from the plaintiff's verdict, if such a verdict is returned, prior to entering judgment. Groves v. Compton, 167 W. Va. 873, 880, 280 S.E.2d 708, 712 (1981). Regardless of which method is used, [i]n the absence of a written stipulation by the parties, the better rule is to leave the question of the manner of handling the offset occasioned by the settlement by a joint tortfeasor, as well as the manner of informing the jury that such party has been dismissed from the lawsuit, to the sound discretion of the trial court. Syl. Pt. 2, Groves, 280 S.E.2d at 709.

Notably, the case law to which Fike directed the circuit court in support of his position that the right to contribution and an allocation of fault are dependent upon a joint judgment (Reager, *supra*, Charleston Area Med. Ctr., Inc. v. Parke-Davis, 217 W. Va. 15, 614 S.E.2d 15 (2005), and Lombard Can., Ltd. v. Johnson, 217 W. Va. 437, 618 S.E.2d 466 (2005)) simply provides that "[a] defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after

judgment has been rendered in the underlying case when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure." Lombard, *supra*, at 441, 450. Said cases do not stand for the proposition that the right to contribution and an allocation of fault are extinguished by a plaintiff's settlement with a joint tortfeasor, rather, said joint tortfeasor is simply limited to pursuit of contribution among joint tortfeasors in the same action rather than a separate cause of action after judgment has been rendered in the underlying case.

Farmers' right to contribution from Fike is not dependent upon a joint judgment. Indeed, unlike the Parke-Davis and Pfizer defendants in Parke Davis, *supra*, whose joint legal obligation had not been established, there is no question that Farmers was forced to pay contract damages, in the form of policy proceeds, as a direct result of Fike's conduct. Moreover, as a result of Fike's actions post-fire, Farmers was required to pay extra contractual damages to Jennings. Due to Fike's improper conduct, alone, Farmers was forced to pay Jennings the coverages available under her Repo Depo policy, totaling two hundred forty-five thousand dollars ($245,000.00). Moreover, unlike the defendants in Parke Davis, Fike defended the suit instituted against him, was involved in the mediation process, and was aware of the settlement reached at mediation. Thus, Fike's reliance upon Parke Davis, *supra,* is misplaced. In addition, the circuit court's reliance upon Reager, *supra*, is also misplaced in that such a ruling relates solely to a statutory right of contribution. In this instance, however, Farmers' right to contribution from Fike is the well-established, inchoate right of contribution. Thus, Farmers should be able to establish that it paid more than its pro tanto share in the settlement with Jennings and recover the same from Fike. Fike, the wrongdoer, should not be permitted to escape responsibility based upon Farmers' foresight to resolve a difficult case.

Thus, for these reasons, the clearly erroneous decision of the Circuit Court of Monongalia County, West Virginia, holding that Farmers' cross-claim against Fike for contribution was extinguished by Farmers' good faith settlement with Jennings, should be reversed so as to permit the case to proceed to trial.

II. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Farmers Did Not Rely upon the Information Provided by Fike in Deciding to Insure Repo Depo, Thereby Defeating Farmers' Cross-Claim for Negligent Misrepresentation.

As a preliminary matter, in its Cross-Claim against Fike, Farmers asserted both general negligence and negligent misrepresentation claims against Fike. Thus, to the extent that it could or may be argued that all Farmers' claims against Fike have been disposed of with the circuit court's grant of Fike's Motions for Summary Judgment, Farmers disputes the same and affirmatively asserts that its general negligence claims, at a minimum, are still viable notwithstanding the circuit court's orders.

With respect to Farmers' negligent misrepresentation claim, "[g]enerally an insured deals with an insurance company through an insurance agent, who generally is authorized to act for the insurance company." Keller v. First Nat'l Bank, 184 W. Va. 681, 684, 403 S.E.2d 424, 427 (1991). Indeed, as highlighted by the Keller Court, W. Va. Code § 33-1-12 defines an insurance agent as "... an individual appointed by an insurer to solicit, negotiate, effect or countersign insurance contracts on its behalf." Id. at 427, 684.

As argued by Farmers to the circuit court below, with regard to a claim for negligent misrepresentation, proof of fraudulent intent is not necessary. In fact,

> Constructive fraud is defined as a 'breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.' The critical

> difference between actual fraud and constructive fraud is that the latter does not require proof of fraudulent intent.

Wilt v. State Auto. Mut. Ins. Co., 203 W. Va. 165, 169, 506 S.E.2d 608, 612 (1988).

Thus, to prevail on its negligent misrepresentation claim, Farmers must show: 1) that the act claimed to be fraudulent is the act of the defendant or induced by him; 2) that the act is material or false; 3) that Farmers relied on it and was justified under the circumstances; and 4) that Farmers was damaged because it relied on the fraudulent act. Kidd v. Mull, *Syl. Pt. 5,* 215 W. Va. 151, 595 S.E.2d 308 (2004). Importantly, when framed in the context of constructive fraud/negligent misrepresentation, the elements of the cause of action must be framed in light of the fiduciary duty in which the two parties are situated. Miller v. Huntington & Ohio Bridge Co., 123 W. Va. 320, 335, 15 S.E.2d 687, 695 (1941).

In its Order of May 20, 2008, the circuit court concluded that since there was no evidence that Fike supplied any information regarding Jennings' prior claims experience that no misrepresentation could, therefore, have been made by Fike and no reliance upon the absence of such information could have occurred by Farmers. Unfortunately, however, the circuit court failed to consider how the absence of such material information was justifiably relied upon by Farmers resulting, ultimately, in damages to Farmers because it relied upon Fike's misrepresentation. Indeed, as a brief review of the deposition transcript of Jennings reveals, Fike made countless misrepresentations on the application he completed for Jennings. The following are just a few examples of the countless misrepresentations contained in Jennings' application:

1) Despite testimony by Jennings that she advised Fike the Repo Depo business was started in 1993 or 1994, on the application Fike reported that Repo Depo was started in 1987; *See Deposition of Doris Jennings, at pages 32-33.*

2) Despite testimony by Jennings that she did not tell Fike that Repo Depo was inside the city limits, on the application Fike reported that Repo Depo was "inside" the city limits; *See Deposition of Doris Jennings, at pages 33-34.*

3) Despite testimony by Jennings that she did not recall being asked if she owned the Repo Depo building or the property upon which it was located, on the application Fike reported that Jennings was an owner. In fact, Jennings' testimony revealed that she only owned the Repo Depo building and not the property upon which it sat; *See Deposition of Doris Jennings, at pages 34-35.*

4) Despite testimony by Jennings that she could think of no reason why she would have told Fike that the Repo Depo building was built in 1987 when it was built in 1997, on the application Fike reported that the Repo Depo building was built in 1987; *See Deposition of Doris Jennings, at pages 32-33.*

5) Despite testimony by Jennings that she had no reason to lie about Repo Depo exposure to flammables, explosives, or chemicals, on the application Fike amazingly reported that there was no exposure to flammables, explosives, or chemicals; *See Deposition of Doris Jennings, at pages 36-37.*

6) Despite testimony by Jennings that had she been questioned about other catastrophic exposure she would have advised Fike of the above-ground gasoline, diesel, kerosene, and heating oil tanks, on the application Fike reported that there was no catastrophic exposure; and *See Deposition of Doris Jennings, at pages 37-38.*

7) Despite testimony by Jennings that there is no fire hydrant anywhere close to the Repo Depo building and that she did not inform Fike that there was a fire hydrant five hundred (500) feet from the building, on the application Fike reported that there was a fire hydrant five hundred (500) feet from the Repo Depo building; *See Deposition of Doris Jennings, at pages 44-45.*

While the deposition transcript of Jennings is replete with additional misrepresentations on Jennings' application, the circuit court below concluded that Farmers did not "detrimentally" rely upon information not provided to it by Fike. As a preliminary matter, Farmers would assert that

"detrimental" reliance is not required to maintain an action for negligent misrepresentation. Rather, only justified reliance is necessary, and Farmers unquestionably justifiably relied upon Fike's misrepresentations. Significantly, what the circuit court failed to consider, however, is that negligence, in and of itself, is defined as an act ***or omission*** which is the proximate cause of the claimant's injury. Sewell v. Gregory, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988). Thus, Fike's negligent misrepresentations, in the form of acts or omissions, may form the basis for Farmers' negligent misrepresentation claim.

While the circuit court emphasizes the fact that Farmers could not have relied upon the information concerning Jennings' loss history due to receipt of the same seven (7) days subsequent to the fire, simply stated, such conclusion misses the mark. Indeed, Farmers would have been justified in concluding that there were no prior losses to report if none were reported by Fike. In fact, during his deposition, Lyndon Auvil, the underwriter for Farmers, testified that he would have spoken to Fike about the application telephonically prior to binding the coverage. *See Deposition Transcript of Lyndon Auvil, at page 51.* Moreover, according to Auvil, he would have expected Fike to advise of prior losses at that time. *See Deposition Transcript of Lyndon Auvil, at page 51.* In fact, when the completed form was forwarded to Farmers it did erroneously indicate that Jennings had no prior loss history. *See Insurance Application, Exhibit 5, at page 2.* Furthermore, in its cross-claim, Farmers alleged that it reasonably relied upon the application information provided by Fike and that Fike supplied false information, failed to fully disclose and/or assess the risk, and negligently induced Farmers to assume insurance coverage of Repo Depo. Nowhere in Farmers' cross-claim against Fike are the allegations limited merely to Fike's failure to report Jennings' loss history. Indeed, the cumulative application misrepresentations including, but not limited to, the absence of a reported loss history, ultimately led to the assumption of coverage of Repo Depo by

Farmers. Had Fike correctly reported: the location of the nearest fire hydrant; presence outside the city limits; exposure to flammables, explosives, and chemicals; and catastrophic exposure, Farmers would not have issued the Repo Depo policy. Thus, Farmers' negligent misrepresentation claim does not rise and fall solely with Fike's failure to provide Jennings' loss history. Nevertheless, Fike's failure to provide Jennings' loss history, an omission, is just another example of the countless misrepresentations made by Fike.

Likewise, Fike's negligence and negligent misrepresentations regarding Jennings' honesty and integrity unquestionably affected Jennings' policy recovery. Fike's accusations of fraud against Jennings, post fire loss, with respect to the information contained in her insurance application forms, caused the proliferation of false conclusions regarding Jennings' honesty and integrity which affected policy recovery.

Thus, in granting summary judgment against Farmers on its cross-claims against Fike, the circuit court erroneously concluded that Farmers did not rely upon the information provided by Fike in deciding to insure Repo Depo. Certainly, it cannot be said that Farmers has not presented a question of fact, appropriate for jury determination, as to whether Farmers relied upon the erroneous information supplied by Fike in making its decision to insure Repo Depo. Accordingly for this reason and for the reasons set forth above, the clearly erroneous decision of the Circuit Court of Monongalia County, West Virginia, granting Fike's Motions for Summary Judgment with respect to Farmers' negligent misrepresentation claims should be reversed so as to permit the case to proceed to trial.

III. The Circuit Court of Monongalia County, West Virginia Erroneously Concluded That Jennings' Claims against Fike Were Not Assignable to Farmers.

As discussed previously, in her Complaint against Fike, Jennings asserted claims for intentional and negligent infliction of emotional distress and for professional negligence. With regard to the assignment of those claims to Farmers, the circuit court concluded that it is inconsistent for Farmers to claim both a right to contribution and an assignment of Jennings' causes of action. The circuit court, however, was mistaken in this conclusion. Indeed, it is entirely consistent for Farmers to settle Jennings' claims for: Hayseeds damages; breach of contract; bad faith-UTPA violations; bad faith-common law violations; intentional infliction of emotional distress; and negligent infliction of emotional distress while simultaneously taking an assignment of Jennings' causes of action against Fike.

In its Order of May 20, 2008, the circuit court stated that "Farmers cannot claim a right of contribution for sums it paid in excess of its share of culpability while also claiming, through assignment, that Jennings has not been compensated for the conduct of Fike." With little analysis, however, it is strikingly apparent that Farmers was forced to settle for a sum far larger than that accounting for its sole liability, due to the conduct and misrepresentations of Fike, for which Farmers could ultimately have been held responsible given the master-servant relationship between Farmers and Fike. Farmers, however, did not negotiate for a global settlement on behalf of both Farmers and Fike. Thus, without question, Jennings' direct claims against Fike (i.e. claims for intentional and negligent infliction of emotional distress and for professional negligence) were and are still viable notwithstanding Jennings' settlement with and release of Farmers.

Significantly, the viability of Jennings' direct claims against Fike is not dependent upon whether they are retained by her or assigned away. Simply stated, Jennings' claims against Farmers

arose entirely as a result of the conduct of Fike. Farmers, therefore, had to pay an increased sum to buy peace due to the master-servant relationship between Farmers and Fike. However, no existing law now prevents Farmers from seeking contribution from Fike for amounts paid by Farmers to Jennings resulting directly from Fike's own negligence. This claim for contribution, however, is entirely separate and distinct from Jennings' direct claims against Fike which she chose to assign to Farmers. Importantly, despite apparent confusion of the issues by the circuit court below, Farmers' right to recovery from Fike for the claims assigned to it from Jennings results from Farmers standing in Jennings' shoes. Because Fike did not settle with Jennings, under controlling West Virginia law, Fike is still liable to Jennings for any verdict returned in excess of the settlement amount paid by Farmers.

Nevertheless, with respect to Jennings' assignment of her direct claims against Fike to Farmers, the circuit court concluded that said assignment was controlled by Hereford v. Meek, 132 W. Va. 373, 52 S.E.2d 740 (1949). Specifically, the circuit court concluded that Jennings' damages (damage to her business and personal reputation, annoyance, inconvenience, emotional distress, and embarrassment) are personal in nature and do not involve any property right so as to permit assignability.

Jennings' claims against Fike do, however, involve property rights. As discussed by the circuit court below, a claim is not assignable which does not directly or indirectly involve a property right. *See Order of May 20, 2008, citing* Hereford. The claims assigned by Jennings to Farmers against Fike involve a property right (a property damage right and property damage claim under Jennings Businessowners Policy) and are, therefore, assignable.

This Court has acknowledged the assignability of insured claims against insurers on several occasions. For example, Aluise v. Nationwide Mut. Fire Ins. Co., 218 W. Va. 498, 625 S.E.2d 260

(2005), involved the assignment of any first-party bad faith claim that the Forsseniuses (insureds) had against Nationwide (the Forsseniuses' insurer) to the Aluises. By its very nature, this assignment included claims for first-party breach of contract, first-party bad faith settlement, coverage issues and duty to defend related to the property damage. Likewise, Hubbard v. State Farm Indemn. Co., 213 W. Va. 542, 584 S.E.2d 176 (2003), involved the assignment of any claims the defendants (the Allis) had against their insurer (State Farm) to the plaintiff (Hubbard). The assignment in question included claims for failure to indemnify and defend, and bad faith claims related to the property damage. Most recently, in Strahin v. Sullivan, 220 W. Va. 329, 647 S.E.2d 765 (2007), this Court permitted and acknowledged Sullivan's assignment of "all of his rights, presently existing or which might hereafter arise, whether in contract or tort, to seek compensation indemnity, defense, compensatory damages, punitive damages, relating to or arising from the Farmers & Mechanics Policy, including but not limited to all claims based on unfair settlement practices, bad faith, or refusal to provide defense and/or indemnity" to the Strahins. By their very nature, these claims include claims for annoyance and inconvenience, intentional infliction of emotional distress, etc. Moreover, in Strahin, this Court reiterated that a chose in action may be assigned. Id. at 337, 773. As acknowledged by the Strahin Court, however, "the mere assignment of rights does not translate into automatic recovery. Rather, the assignee must still satisfy all of the essential elements of the cause of action." Id. at 337, 773.

Justice Davis' concurrence opinion in Strahin further recognizes the assignability of claims. Id. at 341-358. Although Justice Davis distinguished the presented facts, she recognized a number of situations where courts have permitted an insured to assign a cause of action against the agent. Id. at 343-351, *citing* Kobbeman v. Oleson, 1998 S.D. 20, 574 N.W.2d 633 (S.D. 1998); Wangler v. Lerol, 2003 N.D. 164, 670 N.W.2d 830 (N.D. 2003); Stateline Steel Erectors, Inc. v. Shields,

150 N.H. 332, 837 A.2d 285 (N.H. 2003) (upholding assignments under these circumstances than to allow a negligent party to escape liability); and McLellan v. Atchison Insurance Agency, Inc., 81 Haw. 62, 912 P.2d 559 (Haw. Ct. App. 1996). Each of the aforementioned cases permitted the assignment of claims against an agent. As Jennings' claims in this case arise as a result of property damage and in the context of a property damage claim, based upon controlling West Virginia law, the assignment of those claims is permitted.

With regard to Jennings' claim of professional negligence against Fike, Fike argued against assignability relying upon Del. CWC Liquidation Corp. v. Martin, 213 W. Va. 617, 584 S.E.2d 473 (2003). Unlike the case at hand, however, Del. CWC is a decision concerning the attorney-client relationship, which is regarded by the Court, therein, as one "of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of the attorney." Id. at 622, 478.

In contrast to the attorney-client relationship, the insurance agent-insured relationship is substantially different. Indeed, as set forth in West Virginia Code § 33-12-22, "[a]ny person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured." Likewise, as discussed in Forgione v. Dennis Pirtle Agency, 701 So.2d 557, 560 (Fla. 1997), *overruled on other grounds*, "[a]ttorneys and clients have a confidential relationship, which includes constraints upon information that can be disclosed to others. . . ." "The law does not impose similar constraints on communications between an insurance agent and an insured. The relationship between an attorney and client is a fiduciary relation of the very highest character, and the attorney owes a duty of undivided loyalty to the client. . . ." "While an insurance agent is required to use reasonable skill and diligence in obtaining coverage for an insured, the agent also owes the insurance company,

which is his or her principal, an obligation of high fidelity. . . ." Moreover, "[t]he relationship between an attorney and a client is also a personal one. An attorney may not substitute another attorney in his or her place without the client's permission. In contrast, insurance agents are often substituted without prior notification to the insured." Thus, according to the Forgione Court, unlike attorney malpractice claims and based upon the substantial differences between the attorney-client relationship and the insurance agent-insured relationship, public policy considerations do not preclude the assignment of an insured's claim for negligence against an insurance agent. Therefore, as a professional negligence claim brought by an insured against an insurance agent, Jennings claim for professional negligence is clearly assignable to Farmers.

With respect to Jennings' emotional distress claims, as acknowledged by Fike in his "Motion for Summary Judgment on the Claims Assigned by Doris Jennings to Farmers Mutual," and argued by Farmers to the circuit court, the broadly recognized rule in the State of West Virginia is that if a cause of action survives death, it is assignable. Barkers Creek Coal Co. v. Alpha-Pocahontas Coal Co., 96 W. Va. 700, 123 S.E. 803 (1924). Thus, with respect to Jennings' emotional distress claims against Fike, if causes of action for emotional distress survive death then the same are assignable. Unfortunately, like Jennings' claim for professional negligence, the circuit court concluded that Jennings' emotional distress claims were not assignable because they involved "personal" damages. As discussed below, however, controlling West Virginia law holds to the contrary.

Despite Fike's reliance upon Ricottilli v. Summersville Memorial Hospital, 188 W. Va. 674, 425 S.E.2d 629 (1992) for the proposition that emotional distress claims are subject to a one (1) year statute of limitations and, therefore, not assignable, such reliance is unfounded. Indeed, Syllabus Point Five (5) of Courtney v. Courtney, 190 W. Va. 126, 437 S.E.2d 436 (1993), decided after Ricottilli, specifically held that "[a] claim for severe emotional distress arising out of a defendant's

tortious conduct is a personal injury claim and is governed by a two-year statute of limitations under West Virginia Code § 55-2-12(b). . . ." As reasoned by the Courtney Court:

> The critical point is that W. Va. Code, 55-2-12(b), uses the term "personal injuries" rather than "physical injuries." It is too late in the day medically to say that recognizable mental or emotional injuries that arise from severe emotional distress are not injuries to the person. A cause of action for such injuries takes a two-year statute of limitations not because it did or did not survive at common law, but because it is a species of personal injury. As we have pointed out in Part I, *supra*, the two-year period of limitations for personal injuries found in W. Va. Code, 55-2-12(b), is statutorily independent of any common law and this independence is reinforced by the language of W. Va. Code, 55-7-8a(a), which specifically confers survivability on actions for personal injuries.

Naturally, therefore, and in conformance with Barkers, *supra*, it seems only logical to conclude that because Jennings' "personal injury" emotional distress claims survive death, they too must be assignable. To conclude otherwise would counter clear West Virginia controlling precedent.

In granting summary judgment against Farmers on the claims assigned by Jennings to Farmers against Fike, the circuit court erroneously concluded that Jennings' claims against Fike for professional negligence and emotional distress were not assignable to Farmers. Jennings' cause of action against Fike exists only because Jennings suffered property damage and filed a claim with Fike and Farmers. Therefore, the requirements in Hereford, *supra*, are met because Jennings' claim is directly related to the property damage. West Virginia precedent regarding assignability of claims was clearly re-affirmed in Strahin, and Jennings assigned her claim against Fike in accordance with this precedent. Accordingly, for the reasons set forth above, the clearly erroneous decision of the Circuit Court of Monongalia County, West Virginia, granting Fike's Motions for Summary Judgment should be reversed so as to permit the case to proceed to trial.

RELIEF REQUESTED

WHEREFORE, based upon the foregoing and for all the reasons set forth above, the Appellant herein, Farmers Mutual Insurance Company, respectfully requests this Honorable Court enter an Order reversing the Circuit Court of Monongalia County, West Virginia's May 20, 2008 Order Granting Kevin Fike's Motions for Summary Judgment on the Cross-claim of Farmers Mutual Insurance Company and on the Claims Assigned by Doris Jennings to Farmers Mutual and remanding the same with instructions.

Respectfully submitted this the 22nd day of May, 2009.

Appellant, FARMERS MUTUAL INSURANCE COMPANY, By Counsel:

James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Natalie A. Givan (WV State Bar #9567)

400 West Main Street, Fourth Floor
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035

McNeer, Highland, McMunn and Varner, L.C.
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of May, 2009, I served the foregoing "***BRIEF ON BEHALF OF THE APPELLANT, FARMERS MUTUAL INSURANCE COMPANY, IN SUPPORT OF ITS PETITION FOR APPEAL***" upon counsel for the appellee by depositing a true copy in the United States Mail, postage prepaid, in an envelope addressed as follows:

Yolonda G. Lambert
Schrader, Byrd & Companion
32 - 20th Street, Suite 500
Wheeling, WV 26003-3750
Counsel for Kevin Fike